MUSTAFA MAN & ANOR

v.

PAN GLOBAL INSURANCE BHD

HIGH COURT MALAYA, KOTA BHARU
SURIYADI HALIM OMAR J
[CIVIL SUIT NO: MT(3) 22-3-1999]
25 MARCH 2003

ROAD TRAFFIC: *Compensation - Claim for compensation arising out of use of motor vehicle - Liability - Failure to prove issuance of certificate of insurance by insurer - Whether fatal - Whether insurer not liable - Whether claim to be dismissed - Road Transport Act 1987 s. 96(1) - Road Transport Ordinance ss. 80(1), 96(1) - Evidence Act 1950, s. 114(e)*

INSURANCE: *Claims - Motor insurance - Failure to prove identity of insurer - Whether prima facie case not established - Whether fatal - Road Transport Act 1987 ss. 80(1), 96(1)*

The first plaintiff, while driving a motor trailer on 11 October 1981, was involved in an accident with a car bearing registration number BBC 5812 driven by the deceased ('Chung'). Having ascertained with the Registrar and Inspector of Motor Vehicles ('RIMV') that the defendant was the insurer of motor vehicle BBC 5812 at the material time, the plaintiffs sent a notice under s. 80(1) of the Road Transport Ordinance to the defendant. The defendant denied to having insured Chung and so appointed no lawyer to defend him. Subsequently the plaintiffs obtained a default judgment against the defendant as insurer of Chung, and thereafter sought to enforce the judgment pursuant to s. 96(1) Road Transport Act 1987 ('the Act'). Resisting the suit, the defendant adduced evidence which showed: (i) that they had never issued any insurance coverage to Chung in respect of any motor vehicle; (ii) that the RIMV was unable to confirm the genuineness of the insurance policy held by Chung and allegedly issued by the defendant; (iii) that Chung was a Singapore citizen but having the identity card of both Singapore and Malaysia; and (iv) that the policy number on Chung's insurance cover note actually belonged to another motor vehicle and another insured. The issue was whether the defendant was liable under the Act to satisfy the judgment sum thus obtained by the plaintiffs.

Held (dismissing the claim):

[1] If Chung was a Singaporean, how did he magically acquire the supposed Malaysian citizenship, and at the same time possess a Malaysian identity card? How then too did he manage to acquire a Malaysian driving license? Surely there was something amiss here. (p 394 f)

[2] The combined effect of the different identity card numbers supposedly meant for the same person, read together with the issue of the citizenship and the ability of the deceased to possess a Malaysian driving license, must further vitiate the plaintiffs' flimsy case. The advantage of s. 114(e) of the Evidence Act, in relation to the regularity of the official work carried out by the RIMV, must also necessarily disintegrate. (p 394 g-h)

[3] Without any direct evidence being adduced by the plaintiffs advocating responsibility of the defendant as the insurer, and the supposed circumstantial evidence being inadvertently and prematurely rebutted, it would tantamount to stretching all evidential requirements if the court were to conclude that the plaintiffs had established a *prima facie* case. (p 395 a)

[4] The plaintiffs must prove that all the preconditions of s. 96(1) had been fulfilled. This the plaintiffs failed to do. The plaintiffs had failed to prove issuance of the certificate of insurance pursuant to s. 96(1) of the Act by the defendant and the court must hence reject their claim. (p 398 d-e)

Case(s) referred to:

Aspatra Sdn Bhd & Ors v. Bank Bumiputra Bhd & Anor [1987] 2 CLJ 377; [1987] CLJ (Rep) 50 ***(refd)***

Capital Insurance Bhd v. Kasim Mohd Ali [1996] 3 CLJ 19 CA ***(refd)***

Lee Chau v. Public Insurance Co Ltd [1969] 2 MLJ 167 ***(refd)***

The People's Insurance Co (M) Sdn Bhd v. Narayanan Raman [2003] 1 AMR 712 HC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 101, 102, 114(e)

Road Transport Act 1987, ss. 91(1), (4), 96(1)

Road Transport Ordinance, s. 80(1)

For the plaintiff - Chew Kok Lian; M/s Teo & Chew

For the defendant - Kanagasabapathy (Selvavelu & S Dass); M/s Selva Velu & Co

Reported by Rusnah Aziz

JUDGMENT

Suriyadi Halim Omar J:

At the conclusion of the trial, I had directed the contending parties to supply me their respective written submissions, primarily to assist me in my sojourn to wallow through the lengthy and at times complicated facts. Having sieved their submissions, and as they had no serious disagreements on the facts, I find it worthwhile to regurgitate them in the fashion the defendant patterned its case, it being more orderly and certainly more comprehensive. The hashed up sum total of the facts, together with the chronology of events is as follows:

The first plaintiff while driving a motor trailer bearing registration number 7157 on 11 October 1981 was involved in an accident with a car bearing registration number BBC 5812, driven by one Chung Wan Sun. The plaintiffs' solicitors thenceforth sent a notice under s. 80(1) of the Road Transport Ordinance to Pan Global Insurance Berhad, as the R.I.M.V search had revealed that it was the insurer of BBC 5812 at the material time. As Pan Global Insurance Berhad denied insuring the said Chung Wan Sun, no lawyers were appointed to defend him. In fact it did nothing for him. The end result was that the plaintiffs obtained judgment in default wherein they subsequently assessed the damages. Now the plaintiffs have sought to enforce the judgment sum against the defendant ie, Pan Global Insurance Berhad, which is the subject matter of the current suit. In a gist the plaintiffs, *inter alia* had alleged that the defendant was the insurer at the material time based on two R.I.M.V searches, exacerbated by the lack of response by the defendant. The defendant in response had vehemently denied being the insurer of motor car BBC 5812, and had further retorted that the cover note recovered from the R.I.M.V was never issued by it.

The premise of the plaintiffs' attempt to recover the judgment sum from the defendant, was s. 96(1) of the Road Transport Act, and it reads:

> If, after a certificate of insurance has been delivered under subsection (4) of section 91 to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 91 (being liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

Founded on the facts above, I had to decide whether:

> the defendant, Pan Global had issued a cover note and also a certificate of insurance to the driver of motor car BBC 5812 at the material time.

It would naturally follow that:

a. if the defendant had issued and delivered a cover note and a certificate of insurance, then it was liable to meet the claim; and

b. if the defendant had not issued the impugned cover note and that certificate of insurance, the claim against the defendant thus must fail.

It was plain to see that the plaintiff had unabashedly relied on the earlier R.I.M.V searches carried out at Melaka on 12 December 1984, and another at Muar on 10 April 1997, respectively marked as P-l and P-2. Essentially these two exhibits recorded that the insurer of motor-car BBC 5812 from 1 January 1981 to 31 December 1981 *vide* cover note 30/87676/103 was the defendant. P-2 went on further to record that the above motor-car was owned by the abovementioned Chung Wan San. The latter was supposed to have carried the identity card bearing registration number 1098707. To reiterate, the accident had occurred on 11 October 1981 smack in the middle of the supposed insured period.

I cannot over emphasize that, as required by the Evidence Act (ss. 101, 102 etc.), it was incumbent upon the plaintiffs to prove a *prima facie* case first, but yet the evidence adduced at the plaintiffs' stage was very much to be desired. PW1, a former R.I.M.V officer of Melaka subpoenaed by the plaintiffs merely asserted that the impugned document he saw was a cover note, but had failed to produce it. He also admitted being unable to differentiate between a forged cover note and a genuine one. He had also stated that that document had been sent to the R.LM.V's office at Muar, hence the unavailability of the impugned document. PW2, the R.I.M.V officer of Muar was no help either as he could not produce that impugned cover note, adding further that this document was sent to the archives at Seremban on 20 June 1995. Likewise PW3 could not help as regards the cover note. PW4 and PW5 who were the plaintiffs, restricted their evidence to the inescapable fact that they were the victims of the accident and had obtained the judgment, and no more. PW6 who worked in the archives merely managed to produce a computerized copy each of the forms of MV7, MV3 and MV4. She could not supply the court any photostated or computerized copies of the cover note either. As far as she was concerned, the verification of any of the relevant documents was the

responsibility of her officers, her job being only to image the documents. No one had come forward to admit that he or she had verified the truth of the relevant documents.

I must admit that P5 (an MV4 form), which carried the notation "Cert of Ins di semak" (loosely interpreted: "Cert of Ins scrutinized"), may qualify as an indication that the R.I.M.V had not nonchalantly done its duty, but had certainly carried out its task properly in 1981, when recording that the defendant had insured vehicle no. BBC 5812. Apart from that the plaintiffs could invoke s. 114(e) of the Evidence Act 1950, which provides that the court may presume that official acts have been regularly performed. Even if I were to acquiesce to that provision, and conclude that the plaintiffs had established a *prima facie* case, the testimony of the PW7 had negatived that advantage. The latter, the daughter of Chung Man See had testified that her father had died on 6 April 1997 and confirmed that the deceased was indeed the owner of the vehicle BBC 5812 at the material time. Strangely enough she adduced certain bizarre evidence, which had cast a hazy shadow over the plaintiffs' case. To begin with, she testified that at all material time her late father was a citizen of Singapore; she had unhesitatingly adduced her father's Singapore identity card. The identity card produced, tendered as P13, read S-1098707-E a far cry from the number exhibited in P2 (Muar search document), which was without the S and E. Along with that, she tendered her father's driving license marked as P14, and interestingly enough a Malaysian driving license at that, which also indicated the deceased's identity card number. The number was quoted as 1098707 MAL. If he was a Singaporean at that relevant time, how did he magically acquire the supposed Malaysian citizenship, and at the same time possess a Malaysian identity card? How then too did he manage to acquire a Malaysian driving license? Surely there was something amiss here.

To reiterate, on P2 ie, the identity card the number was 1098707; in P13 it was S 1098707E whilst in P14 it was 1098707 MAL. Was the similarity in the numbers mind-boggling coincidence? The combined effect of these different identity card numbers supposedly meant for the same person, read together with the issue of the citizenship and the ability of the deceased to possess a Malaysian driving license, had resulted in the plaintiffs' flimsy case to be inadvertently vitiated. The advantage supplied by s. 114(e) of the Evidence Act, in relation to the regularity of the official work carried out by the R.I.M.V, thus disintegrated with the introduction of PW7's evidence. Whether the deceased Chung Man See had been in cahoots with certain undesirable elements, or an unsuspecting pawn, was certainly relevant from the point of view of the defendant. What was certain was that, without any direct evidence being adduced by the plaintiffs, advocating responsibility on the part of the defendant as the insurer, and the supposed circumstantial evidence inadvertently and

prematurely rebutted, it would tantamount to stretching all evidential requirements, if the court were to conclude that the plaintiffs had established a *prima facie* case.

In the unlikely event of the plaintiffs having discharged the burden successfully, and a *prima facie* case had been established, the sum total evidence of the defendant's case had quickly snuffed out that last trace of possibility. The defendant had come well prepared to rebuff any allegation that it had insured vehicle no. BBC 5812, firstly by introducing the evidence of DW1, an officer of the NRIC Department. She gave unchallenged evidence that the identity card number 1098707 (similar to that in P2) belonged to one Che Gaya who resided at Simpang KT, Mata Air, 02500, Kangar, Perils. In one stroke she had cast doubt on P2, ie, the search document obtained from Muar, which carried that identity card number of the supposed Chung Man See. If P2 were open to doubt, surely the veracity of PI, which also bespoke of the same person as being the owner, would suffer the same fate.

DW2, one Elaine Wong who had been working with the underwriting department of the defendant's office for 24 years, sealed the fate of the plaintiffs' case. Before proceeding further, I must add that at no time was the competency or truthfulness of this witness ever challenged or put to the test by the plaintiffs; there was also absolutely no reason for the court not to accept her evidence. When referred to PI and P2, with specific reference to the insurance particulars, she stated that the numbers supplied therein did not reflect the reference numbers supplied by the defendant, either for the policy or certificate of insurance. To stress her point, after referring to certain exhibits in the like of D4 and D9, she convinced the court that cover notes emanating from the defendant carried 7 digits, whilst PI revealed ten.

Reverting to the numbers from the impugned insurance certificate ie, PI (at the same time referring to a certificate of insurance issued by the defendant, for comparison and analogy), she testified that a genuine insurance certificate should carry the territorial code, the year code, a number to indicate whether there was any renewal or not, the actual policy numbers, a number showing whether it was a private vehicle or commercial vehicle and finally a number to indicate whether it was a comprehensive or third party policy. All in all it had to have 13 digits. PI and P2 only had 10 digits for the insurance certificate, with the year code and the renewal code, among others missing. In *The People's Insurance Co (M) Sdn Bhd (Sekarang Dikenali Sebagai Tahan Insurance (M) Bhd) v. Narayanan Raman* [2003] 1 AMR 712 Su Geok Yiam JC had the opportunity to endorse the above mode of adducing evidence and in the end concluded the claimant's as obviated. I see no reason to disagree with the court's view and approach.

Despite that thorough clarification, DW2 persisted in drawing the court's attention to the number of 87676 found in PI and P2 at F and E. Adverting to the evidence tendered, she testified that those policy numbers belonged to one Chia Lin Pion meant for vehicle number BCC 7288, with a cover note bearing number 8363796, with the policy coming into force on 22 September 1989 and expiring on 21 September 1990, indisputably not in 1981. She thus was satisfied beyond any doubt that the impugned policy numbers never belonged to Pan Global Insurance Berhad. The defendant's evidence here thus went beyond the realm of denial when it substantiated its case with oral and documentary evidence.

For completeness sake, I would like to refer again to the relevant portion of s. 96(1) of the Road Transport Act under consideration which reads "If, after a certificate of insurance has been delivered under sub-s. (4) of s. 91 to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under para. (b) of sub-s. (1) of s. 91 (being liability covered by the terms of the policy) is given against any person insured by the policy, ... the insurer shall ... pay to the person entitled to the benefit of the judgment ... .

A cursory perusal of the above provision by due construction, *inter alia*, must have these ingredients, namely:

a. a valid certificate of insurance has been issued;

b. the insurer is identifiable and had indeed issued that valid certificate of insurance;

c. the insured is identified;

d. the insured has received that valid certificate of insurance (as there was delivery);

e. judgment in respect of liability is given against any person issued by the policy; and

f. the insurer, if the above ingredients have been proved, must statutorily pay up to the person or persons entitled to the judgment (*Lee Chau v. Public Insurance Co Ltd* [1969] 2 MLJ 167).

A rather interesting poser, which had attracted my attention, though not canvassed by both parties was, whether the insurer must personally and physically deliver that certificate of insurance. If the answer were to be in the positive, then any other conduits in the like of insurance agents, sales agent

etc. (third party factor) would be relegated to the recycle bin and dumped into the annals of insurance. To stretch the matter to its extreme, utilizing the postal or courier service would likewise be intolerable, as delivery by them would vitiate the issuance of the certificate. Insurance business certainly would suffer serious setbacks if that were to be the construction. Siti Norma Yaakob JCA (as Her Ladyship then was) in *Capital Insurance Bhd v. Kasim Mohd Ali* [1996] 3 CLJ 19 under held, had occasion to conclude that:

> 1. Section 96(1) speaks of the delivery of a certificate of insurance by an insurance company to the insured and not by anybody else. The certificate must therefore be delivered by the appellant to the insured and not by anybody else. In the circumstances, the letter from the RIMV does not fulfill the requirements of s. 96(1).
>
> 2. By the R.I.M.V's letter the policy may well have been issued by the appellant but it is not evidence of any delivery of a certificate of insurance by the appellant to the insured as required by section 96(1) ... . The letter is not the certificate that is envisaged by section 96(1).

In brief, it was crystal clear that Her Ladyship was of the opinion that the certificate must be delivered by the insurer, and nobody else. But then, did it mean that none of its agents, under one of the exceptions to the normal rule of privity of contract, could deliver that certificate of insurance on its behalf, despite the liberality of the law of agency in Malaysia? It is trite law that agents may be appointed either expressly (e.g. by deed, writing or oral) or by operation of law (agency by implication, or even by necessity). The authority assumed by the agents will be what the principal actually instructs, and cannot depart from it. Once the agent has brought his principal into contractual relation with the third party, he drops out of the picture, and thereafter only the principal can sue and be sued on the contract. Without going into details, the agent will not get off the hook and may be personally liable only under certain circumstances.

In the above Court of Appeal case, indisputably the R.I.M.V which is a government institution could never have qualified as an agent (in the like of being an insurance broker], for the insurer, let alone a finding be made pronouncing the R.I.M.V document (government based document) be construed as an insurance coverage document. With those unique set of facts before her what other conclusion could Siti Norma JCA have arrived at, except conclude that no delivery of the certificate of insurance was made by the defendant.

To compound the matter further, in comparison to the current case, which had undergone a full trial, the matter before Her Ladyship was one of a summary judgment application. Needless to say too, in any O. 14 application, the burden

is on the applicant to establish that the matter under consideration could be dealt with summarily as no triable case existed. With the intricate poser of whether the certificate of insurance ought to have been delivered by the insurer or not was too obvious for comfort, it thus was not surprising that its intricacy had not escaped the attention of the Court. That being so, there was more than ample ground for the Court of Appeal to order a full trial. It is also trite law that only at the culmination of a full and blistering trial that a decision may be made, and in this case, whether delivery must personally and physically be effected by the insurer without having to go through the conduit of a third party. The stage of the O. 14 application is merely to decide whether a triable case existed or not and no more. If it can be dealt with summarily then an order in terms is granted. Otherwise, without making any finding of fact or law, the application is rejected and a full trial ordered.

To wind up the matter under discussion, as the law imposes a statutory liability on the insurers to satisfy a third party claim, the latter, in this case the plaintiffs, thus must prove to the court that all the preconditions of s. 96(1) had been fulfilled. It must be done within the four walls of the written law, and not on non-established principles. However sympathetic I may be of the plaintiffs predicament, with no other recourse to alleviate their dire needs, except hoping to exact something from the defendant, but without the availability of cogent evidence before me, it was with regret that I have to reject their claims. The remarks of Seah SCJ in a dissenting judgment in *Aspatra Sdn Bhd & Ors v. Bank Bumiputra Bhd & Anor* [1987] 2 CLJ 377; [1987] CLJ (Rep) 50 are equally applicable and especially in point, when His Lordship ventilated:

> In coming to this conclusion I am reminded that where the jurisdiction of the court, however admirable its intentions, is not entitled to go outside the written law and in effect, purported to legislate for itself.

With the above factual findings that the plaintiffs had failed to prove issuance of the certificate of insurance pursuant to s. 96(1) of the Road Transport Act by the defendant, let alone delivery, I had no compunction in rejecting the plaintiffs' case against the defendant with costs.